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IN THE

Supreme Court of the United States

A WOMEN'S CHOICE-EAST SIDE WOMEN'S CLINIC, A CLINIC FOR WOMEN, INC., PLANNED PARENTHOOD OF CENTRAL AND SOUTHERN INDIANA, INC., INDIANAPOLIS WOMEN'S FACILITY, FORT WAYNE WOMEN'S HEALTH ORGANIZATION, INC., ULRICH G. KLOPFER, D.O., WOMEN'S PAVILION, INC., and FRIENDSHIP FAMILY PLANNING CLINIC OF INDIANA, on behalf of themselves and their patients seeking abortions,

Petitioners,

—v.—

SCOTT C. NEWMAN, in his official capacity as a Prosecuting Attorney for Marion County, and GREGORY WILSON, M.D., in his official capacity as Commissioner of the Indiana Department of Health,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the court of appeals erred in upholding Indiana's requirement that a women seeking an abortion obtain certain information *in person* 18 hours in advance of the abortion, rather than by telephone, despite district court findings that providing the information by telephone has no persuasive effect on women in Indiana, and that requiring an in-person visit to obtain such information would prevent approximately ten percent of women seeking abortions from obtaining them?

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Petitioners A Woman's Choice-East Side Women's Clinic, Indianapolis Women's Facility, A Clinic for Women, Inc., Planned Parenthood of Central & Southern Indiana, Inc., Fort Wayne Women's Health Organization, Ulrich G. Klopfer, D.O., Women's Pavilion, Inc, and Friendship Family Planning Clinic of Indiana hereby respectfully petition this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.[1]

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is reported at 305 F.3d 684 (7th Cir. 2002), and is reproduced in the appendix to this petition at A-1-62.[2] The opinion of the United States District Court for the Southern District of Indiana is reported at 132 F. Supp. 2d 1150 (S.D. Ind. 2001), and is reproduced at A-63-125. The district court's prior opinions are reported at 904 F. Supp. 1434 (S.D. Ind. 1995) (preliminary injunction opinion), and 980 F. Supp. 962 (S.D. Ind. 1997) (opinion modifying preliminary injunction). These opinions are reproduced at A-126-152 and A-153-236, respectively. In addition, the opinion of the Indiana Supreme Court answering questions certified by the district court is reported at 671 N.E.2d 104 (Ind. 1996).

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[1] MGK, Inc. is the corporation doing business as Women's Pavillion. Plaintiff Indiana Women's Facility is owned by Women's Medical Professional Corporation. None of the Petitioners is a publicly held company or has a parent corporation that is a publicly held company.

[2] The appendix to this Petition is cited as "A-__"; citations to trial exhibits are in the form "Exh. __"; citations to the trial transcript are in the form "Tr.__ (last name of witness)."

JURISDICTION

The opinion of the United States Court of Appeals for the Seventh Circuit was issued on September 16, 2002. A-1-62. Petitioners filed a timely petition for rehearing and rehearing en banc on September 30, 2002. The petition for rehearing en banc was denied by an equally divided vote on October 28, 2002, and the petition for rehearing by the panel was denied on the same date by a 2-1 vote. A- 237. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

I. Indiana Code section 16-34-2-1.1, the statute at issue in this case, is reproduced in the appendix at A-239-240.

II. U.S. CONST. amend. XIV, § 1 (in relevant part): "Nor shall any State deprive any person of life, liberty, or property without due process of law."

STATEMENT OF THE CASE

I. This Court's Precedent.

Just over a decade ago, this Court issued its judgment in *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), *via* the joint opinion of Justices O'Connor, Kennedy and Souter ("the Joint Opinion"). The Joint Opinion announced a new standard of review applicable to the right to abortion, the "undue burden" standard. Applying this newly-minted standard, the Joint Opinion upheld a provision of Pennsylvania law under which, except in a medical emergency, a woman seeking an abortion must be provided with certain information 24 hours prior to the performance of the procedure. *See id.* at 881 (describing 18 Pa. Cons. Stat. § 3205). The plaintiffs in *Casey* challenged this provision

"because it includes the provision of specific information by the doctor and the mandatory 24-hour waiting period." *Id.*

The Joint Opinion held that the requirement that specific information be provided to every woman seeking an abortion "may be permissible" if it is "truthful and not misleading," *id.* at 882, even if the information may be "designed to dissuade the woman from having an abortion." *Id.* The Joint Opinion, however, found the mandatory 24-hour waiting period to present "a closer question." *Id.* at 885. The Court considered factual findings made by the district court about the likely impact of the waiting period on women, premised on the assumption that "a woman seeking an abortion [must under the statute] make at least two visits to the doctor," *id.* at 886, one to obtain the required information, and at least one to obtain the procedure. The district court had found that the additional required visit would, for logistical reasons, result in a delay of more than 24 hours for many women; would increase the exposure of women to harassment from anti-abortion protestors, and would be "particularly burdensome" for "women who have the fewest financial resources, those who must travel long distances, and those who have difficulty explaining their whereabouts to husbands, employers, or others . . . ." *Id.* Although the Joint Opinion found these findings "troubling in some respects," *id.*, and although it did not disturb the district court's finding that the waiting period did not promote maternal health, *id.*, it concluded that these findings did not "demonstrate that the waiting period constitutes an undue burden." *Id.*

First, the Joint Opinion reasoned that even though the waiting period did not promote maternal health, it was permissible as a "persuasive measure[] which favor[s] childbirth over abortion." *Id.* Second, the Joint Opinion concluded that though it did not *promote* maternal health, the waiting period did not impose "a real health risk" on women, because it contained an adequate medical emergency exception. *Id.* Third, the Joint Opinion held that the district

court's finding of "particularly burdensome" effects on some women did not "of necessity" amount to a substantial obstacle and hence an undue burden. Thus, the Joint Opinion upheld the waiting period "on the record before us, and in the context of this facial challenge . . . ." *Id.* at 887.

In the intervening ten years since *Casey*, many states have enacted statutes requiring the provision of specific information to women seeking abortions. Most of these statutes alleviate the worst burdens of the waiting period by permitting the required information to be provided to women by telephone rather than in person, thus eliminating the necessity of an additional visit to a physician or other health care provider. *See, e.g.*, ARK. CODE ANN. § 20-16-903(b)(2)(A)(i)-(ii),(B) (2002) (by telephone or in person; by telephone without conducting physical examination or tests); NEB. REV. STAT. § 28-327(1),(2)(d) (2002) (by telephone or in person, without conducting a physical examination or tests, unless patient requests the written material which must be given to her twenty-four hours prior to the abortion or mailed seventy-two hours prior to the abortion); N.D. Op. Att'y Gen. L-115 (1993) (interpreting N.D. CENT. CODE § 14-02.1-02(5)(a),(b) (2001) to permit the description of the state-printed materials to be given by telephone or in person, and the rest of the required information by telephone, in person, or in writing, by mail or facsimile). [3] Only five states

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[3] States also vary the length of the waiting period, *see, e.g.*, ARK. CODE ANN. § 20-16-903(b)(1) (2002) (information must be provided to the woman "prior to and in no event on the same day as the abortion"); IDAHO CODE § 18-609(3) (2002) (requiring that the state materials be provided to the patient at least twenty-four hours before the procedure "if reasonably possible"); KAN. STAT. ANN. § 65-6709 (2001) (mandating twenty-four hour waiting period); S.C. CODE ANN. § 44-41-330(C) (2002) (mandating one-hour waiting period), prescribe the required information with various degrees of specificity, *see, e.g.*, MISS. CODE ANN. § 41-41-33(1)(a)(ii)(iv) (2002) (woman must be told the "particular medical risks associated with the particular abortion procedure to be employed including, when medically accurate, the risks of infection,

(Indiana, Louisiana, Mississippi, Utah and Wisconsin) specifically require certain information to be delivered in person to the woman.[4]

The experience of these states in implementing waiting-period statutes similar to the one upheld by the Joint Opinion

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hemorrhage and breast cancer, and the danger to subsequent pregnancies and infertility," as well as the medical risks associated with carrying her child to term); S.C. CODE ANN. § 44-41-330(A)(1)(2) (2002) (woman must be informed only of the probable gestational age of the fetus and her right to review state printed materials); WIS. STAT. § 253.10(3)(c)(1)(f) (2001) (woman must be informed of the "medical risks associated with the particular abortion procedure that would be used, including risks of infection, psychological trauma, hemorrhage, endometriosis, perforated uterus, incomplete abortion, failed abortion, danger to subsequent pregnancies and infertility"), allow health care providers other than physicians to provide the information, *see, e.g.*, ARK. CODE ANN. § 20-16-903(a)(1) (2002) (permitting an agent of the physician to provide the mandatory information); MICH. COMP. LAWS § 333.17015 (2002) as modified by *Northland Family Planning Clinic, Inc. v. Engler*, No. 94-75351, Settlement Stipulation (June 17, 1999) (permitting a "qualified person assisting physician," defined as a licensed psychologist, professional licensed counselor, registered professional nurse, licensed practical nurse or registered social worker, or any agent of the physician "who is 'qualified by education, training, or experience,' to provide mandated information); NEB. REV. STAT. § 28-327(1) (2002) (permitting a licensed physician assistant or registered nurse who is an agent of the physician to give the mandatory information provided he or she has been trained in sexual and reproductive health, abortion and contraceptive technology, short-term counseling skills, community resources and referral, and informed consent); N.D. CENT. CODE § 14-02.1-02(5)(a) (2001) (allowing information to be provided by an agent of the physician); UTAH CODE ANN. § 76-7-305(1)(a)(b) (2002) (permitting a registered nurse, nurse practitioner, advanced practice registered nurse, certified nurse midwife or physician's assistant to deliver the mandatory information; in addition to these individuals, certain specified information can be delivered by a clinical laboratory technologist, psychologist, marriage and family therapist, clinical social worker or certified social worker).

[4] Although partially enjoined, Indiana's law has, since 1997, been implemented in a manner that allows women to receive the mandatory information by telephone rather than in person. A-126.

provides important new evidence beyond what was available to this Court in *Casey*. First, as set forth in more detail below, ***experience with these laws in Indiana, North Dakota and Pennsylvania demonstrates that the information required under these laws does not persuade women to choose childbirth over abortion***. Second, ***experience with these laws in Mississippi and Utah demonstrates that the statutory requirement of an additional in-person visit to obtain statutory information is so burdensome for some women that it prevents approximately ten percent of women from obtaining abortions***. Thus, the district court concluded, based on a record substantially different from the one available to this Court in *Casey*, that Indiana's requirement of an in-person information visit to an abortion provider imposes an "undue burden," and is unconstitutional.

II. The Proceedings Below

In 1995, the Indiana Legislature enacted a new statute governing informed consent for abortion. Prior to its effective date, this case was instituted in the United States District Court for the Southern District of Indiana, challenging the statute on the grounds that it violated the privacy and equal protection rights of those patients of the plaintiffs who desired abortions. Thus, the district court had jurisdiction under 28 U.S.C. § 1331. The district court issued a preliminary injunction against the statute for two reasons: first, based on uncontroverted evidence from experience with a similar law in Mississippi, the district court concluded that implementation of Indiana's requirement of an additional informational visit would prevent at least ten percent of women from obtaining abortions in Indiana. Second, based on its interpretation of the statute's medical emergency exception under Indiana rules of statutory construction, the district court held that the exception was inadequate to protect women's health. Because of the necessity of an adequate medical emergency exception under this Court's

opinion in *Casey*, 505 U.S. at 880, the district court enjoined Indiana's law in its entirety. At the same time, the district court recognized that its construction of the medical emergency definition was necessarily a tentative one, and therefore certified to the Indiana Supreme Court questions regarding the definition. Respondents ["the State"] filed a notice of appeal of the preliminary injunction to the Seventh Circuit, but repeatedly postponed prosecution of the appeal while the Indiana Supreme Court considered the certified questions.

In 1996, the Indiana Supreme Court, in a 3-2 decision, disagreed with the district court's construction of the statute's medical emergency definition and instead adopted a broader construction that obviated any constitutional infirmities. Accordingly, after further briefing, the district court modified its preliminary injunction and allowed the statute's informed consent requirement to take effect, minus the requirement that the information be delivered in person to the woman. The State affirmatively argued that modification of the injunction was required because, *inter alia*, the Indiana Legislature would have intended the statute to be implemented even without the in-person requirement. Thus, in late 1997, women in Indiana began to receive the information mandated by the statute, albeit by telephone in most cases. The State did not appeal from this modified preliminary injunction.

After a trial on the merits was held, the district court made permanent its modified preliminary injunction. Its decision was based on two basic factual findings. First, the district court found that in Mississippi, where a law requiring an additional in-person informational visit was implemented, the law caused a decrease on the order of ten percent in the number of women obtaining abortions. Second, based on evidence from Mississippi, and based on evidence from Indiana showing that the information had no persuasive effect when delivered by telephone, the district court

concluded that the ten percent reduction in the number of abortions could not be ascribed to the persuasive effect of the information. Thus, the district court concluded that if Indiana's requirement of in-person delivery of the information were implemented, that requirement would prevent approximately ten percent of women from obtaining abortions. The district court reasoned that this effect amounted to a substantial obstacle, and therefore an undue burden.

The Seventh Circuit, in a fractured decision, reversed. Each judge on the three-judge panel wrote a separate opinion; two judges (Coffey and Easterbrook, JJ.) opined that the in-person requirement was constitutional, while one judge (Wood, J.) agreed with the district court that the in-person requirement amounted to an undue, and hence unconstitutional, burden on women seeking abortions in Indiana. The court of appeals denied rehearing *en banc* by a 5-5 vote (Posner, Rovner, Evans, Wood and Williams, JJ., would have granted rehearing *en banc*). On November 14, 2002, Judge Easterbrook stayed the Seventh Circuit's mandate pending the filing with this Court of a petition for certiorari, thus leaving in place the district court's injunction against enforcement of the in-person requirement.

A. The Factual Findings of the District Court

Indiana's informed consent statute for abortion requires certain information to be imparted to women seeking abortions at least 18 hours in advance of the procedure. At issue in this case is only whether it is constitutional for Indiana to require that information to be imparted to women *in person* rather than by other means. After a trial on the merits, the district court concluded that this "in person" requirement was unconstitutional because it would reduce by 10-13% the number of abortions performed in Indiana, and because this effect would result from compulsion rather than persuasion. A-112. Specifically, the district court found that

after laws similar to Indiana's were implemented in Mississippi and Utah, the number of abortions in each State dropped by about 10%. A-109. The district court also found that implementation of Indiana's law *without* its "in person" requirement demonstrated that the information provided to women had no persuasive effect, because, if anything, the information appeared to *encourage* women to obtain abortions. A-114-115. In addition, data about women leaving Mississippi to obtain abortions in neighboring states corroborated the lack of persuasive effect. A-115. Thus, the district court inferred that implementation of Indiana's "in person" requirement would cause a decrease in the number of abortions in Indiana on the order of 10% to 13%, and that this decrease would be the result of the coercive effects of the "in person" requirement rather than of the persuasive effects of the information. A-118.

As to the persuasive effect of the information required under Indiana's law, the district court had before it unrebutted evidence that the information required by Indiana's law, when delivered by telephone, *was not persuasive at all, or at best persuaded more women to obtain abortions*. It is, of course, not reasonable to infer that information which has *zero* persuasive effect (or a slight persuasive effect in the direction opposite of that asserted to be the desired effect) will have any significant persuasive effect when delivered in person.[5] Moreover, evidence in the record from Pennsylvania also supported the district court's conclusion that the information is not persuasive, even when delivered in person.[6] *See* Exh. 216, at p. 230 (clinic director

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[5] Thus, even if we assume *arguendo* that "in person" delivery of information in general *doubles* the influential effect of the information, twice zero is still zero. There is simply no plausible mechanism by which delivery of utterly unpersuasive information becomes persuasive (presumably against the abortion choice) when delivered in person.

[6] As Judge Wood points out, the district court's factual inference is further supported by evidence demonstrating that women in Mississippi

in Pennsylvania reported that although "a small percentage of patients change their mind at some point in the preabortion process, . . . that percentage has not changed since implementation of the [informed consent] law").[7] Thus, the district court's inference from the evidence before it was reasonable.[8]

The district court also found that the "results in Mississippi provide a reasonable basis for predicting estimated results in Indiana," concluding "[t]here is no

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left the state after that state's "in person" informed consent statute was implemented and experienced an increase in second-trimester abortions. A-58. Such changes can only be explained by the deterrent effects of the law. This evidence is completely disregarded by the majority opinion. *See* A-59 (Wood, J., dissenting) ("Only by disregarding key points such as the number of women who willingly undertook the burden of seeking an abortion out-of-state, where they could have the entire procedure accomplished in one visit, rather than staying in-state and enduring the two-visit burden, can the majority come to the result it does.").

[7] This clinic in Pennsylvania provided the required information in person. *Id.*

[8] The utter lack of evidence supporting the speculation by the court of appeals that "in person" information will miraculously transform zero persuasion into something detectable is only confirmed by the concurring opinion of Judge Coffey. Judge Coffey resorts to reliance upon an amicus brief to support his belief that providing information in person will be more persuasive, *see* A-36 (Coffey, J. concurring), and to a statement during legislative debates indicating that women seeking abortions "might very well 'want to talk personally to the person who may be performing' the procedure," A-36. But Indiana's "in person" requirement *forces* women to have an additional in-person visit; and absent the "in person" requirement of the law, women are of course free to obtain Indiana's information in person if that is what they "want." Indiana's law, simply put, is not about respecting what women "want," but about imposing a regime on them regardless of what they want. Nor does Judge Coffey's litany of "the almost endless number of physical risks" he believes is involved in an abortion, or his claims that abortion causes suicide and other mental health problems -- none of which is supported by the record in this case -- have anything to do with whether women will be more persuaded by receiving the law's very basic information in person or by other means.

reason on this record to expect the experience to be significantly different." A-110. This finding was based on uncontroverted evidence. Stanley Henshaw, an expert in reproductive epidemiology, testified that the results of his Mississippi study could generally predict the effect of similar laws in other states because certain characteristics, such as cost and attitudes toward abortion, "are fairly uniform throughout the country." Tr. 35. He further testified that Mississippi and Indiana in particular are similar in that both states have low abortion rates compared to the national average and less accessibility to abortion services than other states. Tr. 34-35. Moreover, second trimester abortions are available at only a single facility in Indiana – Wishard Hospital in Indianapolis. Tr. 27 (Culp). Thus, the district court's finding that effects observed in Mississippi are likely to occur in Indiana has ample support in the record.

B. The Seventh Circuit's Holdings

Each judge of the court below authored a separate opinion. Judges Easterbrook and Coffey found Indiana's in-person requirement constitutional and therefore voted to reverse the district court, while Judge Wood in dissent would have affirmed the district court. Judge Coffey explicitly concurred in Judge Easterbrook's opinion on the basis that "Pro-life legislation that *fails to pose a substantial obstacle for 87 to 90 percent of a state's women*, and may have the *incidental* effect of reducing the demand for abortions by merely 10 to percent, is reasonable, sensible, and lawful under the Constitution of the United States and the State of Indiana." A-39 (emphasis added).[9] In other words, a statute that does impose a substantial obstacle for 10 to 13 percent of women seeking abortions is permissible according to the court below so long as it is "pro-life legislation." Judge

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[9] Despite Judge Coffey's sweeping statement, this case has never involved claims under the Indiana Constitution.

Coffey also attacked the district court more generally, accusing it of:

> [D]isregard[ing] controlling legal authority, cast[ing] aside the opinions of qualified medical experts and the judgment of the people of Indiana as represented by the elected members of the Indiana General Assembly . . . . I remain convinced that the trial judge abused his discretion when depriving the sovereign State of Indiana of its lawful right to enforce the statute before us. I can only hope that the number of women in Indiana who may have been harmed by the judge's decision is but few in number.

A-38-39 (Coffey, J., concurring).

Judge Easterbrook engaged in similar but perhaps more opaquely expressed reasoning. First, Judge Easterbrook claimed to find no clear error with any of the district court's findings of fact. A-10. Nevertheless, Judge Easterbrook's opinion replaces virtually every reasonable inference reached by the district court with an alternative, much more speculative inference. The key findings of the district court are (1) that when in-person informational visits began to be required in Mississippi and Utah, the number of abortions in those states fell by about 10%; and (2) that based on the lack of any demonstrable persuasive effect of the required information when provided by telephone in Indiana, as well as on other evidence, this type of effect was due to coercion rather than persuasion. The district court also concluded that a similar effect would likely result in Indiana. Judge Easterbrook, however, indulged in a series of implausible alternative explanations for the findings made by the district court:

> *Maybe* . . . Indiana differs from Mississippi and Utah and will not experience a substantial decline

> [in the number of abortions], with or without multiple visits. Or *maybe* what it shows is that presenting the information in person is critical to its persuasive effect. Our education system rests on the premise that information delivered orally, with an opportunity for give-and-take, "takes" better than information delivered exclusively in writing. . . . So the fact that advice delivered in writing or over the telephone is uninfluential *need not* imply that advice delivered in person will be uninfluential. *[T]he fact that Indiana has been blocked from enforcing its law as written means that the record does not contain evidence needed for an accurate assessment of the statute's effects.*

A-13 (emphases added).[10] *See also* A-16 ("[W]hat transpired in Mississippi need not portend what will happen in Indiana.").

In addition to disputing the inferences made by the district court, Judge Easterbrook also speculated that, if a 10% decline in abortions resulted from full enforcement of Indiana's law, this might be the result of the "possibility that about 10% of all women who have abortions are *on the fence* between ending the pregnancy and carrying the pregnancy to term, so that even a modest cost tips the scales." A-14 (emphasis added). Such modest costs that simply make

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[10] It is worth noting that Indiana's law does not require any "give-and-take" regarding any of the information that must be provided to women. While general principles of informed consent for any medical procedure may require a discussion about the risks, benefits and alternatives to the proposed course of treatment, Indiana's law simply requires the woman to be "informed" of certain data. Further, Judge Easterbrook's intimation that the Act's information was provided to women in *writing* and therefore was rendered less influential is a red herring. The statute (as limited by the district court, A-152) requires the information to be provided "orally," A-239, and there is no evidence that the statute has been violated by any abortion provider.

abortion a less favored option for women "on the fence," Easterbrook writes "would not be an undue burden," *id.*, because they would not constitute a substantial obstacle. In other words, under Judge Easterbrook's reasoning, the State can impose a sort of "sin tax"[11] on the exercise of the right to choose abortion simply to influence the exercise of that right.

Judge Wood dissented. In her view, "the majority disregards the standards that were established by the Supreme Court in [*Casey*], for evaluating laws that impose burdens on a woman's right to seek an abortion, and it brushes aside the painstakingly careful findings of fact the district court made in support of the limited . . . injunction it issued against Indiana's so-called informed consent law, Ind. Code § 16-34-2-1.1." A-39 (Wood, J., dissenting). As she points out, statutes which raise the costs of an abortion may do so in two ways: "an increased cost is unconstitutional if it has the purpose or effect of *forcing* some women to give up their constitutional right to choose abortion; it is constitutional if it genuinely furthers the state's legitimate interest in *persuading* women not to select abortion when faced with an unwanted pregnancy." A- 41. Judge Wood believed that the majority had applied a standard of review so deferential "that a state statute [like Indiana's] would be

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[11] Because the district court correctly found that Indiana's required information has no persuasive effect, the costs imposed by the "in person" requirement serve no purpose other than to deter behavior Indiana finds objectionable. But, as the Chief Judge Posner wrote, "if a statute burdens constitutional rights and all that can be said on its behalf is that it is the vehicle legislators have chosen for expressing their hostility to those rights, the burden is undue." *Hope Clinic v. Ryan*, 195 F.3d 857, 881 (7th Cir. 1999) (*en banc*) (Posner, C.J., dissenting); *see also Harris v. McRae*, 448 U.S. 297, 317 n.19 (1980) (recognizing that "a substantial constitutional question would arise if Congress had attempted to [penalize] a woman for exercising her constitutionally protected freedom to terminate her pregnancy," and noting that "a refusal to fund protected activity, without more, cannot be equated with the imposition of a 'penalty' on that activity").

unconstitutional only if there was 'no set of circumstances' under which it was valid — by which it seems to mean that not a single woman in Indiana would find the law's burdens tolerable." A-43. Further, she believed that the majority erred by "indulg[ing] the presumption that the law imposes no burden at all . . . [a presumption] found nowhere in our jurisprudence, at least for laws implicating fundamental constitutional rights." A-43.

Turning to the facts established in the record, Judge Wood criticized the majority for rejecting the district court's inference that effects observed in Mississippi and Utah were likely to occur in Indiana as well:

> [The majority] has made assumptions about inter-state differences that are unsupported in this record (and, I suspect, unsupportable). . . . In the field of economics, we assume people will react in similar and predictable ways to incentives. . . . Consistently with that well-accepted proposition, there is every reason here to assume that Indiana women will react to proven incentives and disincentives in the same way women from other states (*e.g.*, Mississippi) have been shown to respond.

A-49-50. And Judge Wood found no plausible way to disturb the district court's finding that the likely effect of Indiana's "in person" requirement would be a result of the undue burdens it places on women. A-59.

REASONS FOR GRANTING THE WRIT

The decision of the court below flouts the undue burden standard adopted by this Court in *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), and re-affirmed in *Stenberg v. Carhart*, 530 U.S. 914 (2000). Instead of following this Court's precedents, the court below employed its own standard of review that is completely deferential to the State,

and much less protective of the constitutional rights of women in Indiana. As set forth in more detail below, the Seventh Circuit misapplied *Casey* so severely that the result is a standard not recognizable as one applicable to a constitutional right. Thus, the conflict regarding this important constitutional question is one that should be resolved by this Court, *see* SUP. CT. R. 10(c), so that the women residing in Illinois, Indiana and Wisconsin are not deprived of all meaningful protection for the important constitutional right to choose between abortion and childbirth.

In *Casey*, the joint opinion of Justices O'Connor, Kennedy and Souter adopted a new "undue burden" standard for evaluating the constitutionality of restrictions on abortion. Notably, the Court's judgment did not eliminate the constitutional right to choose abortion, as some of the dissenting Justices in *Casey* would have done. *See* 505 U.S. at 966 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part, joined by White, Scalia & Thomas, JJ.) ("States may regulate abortion procedures in ways rationally related to a legitimate state interest."). Indeed, the only opinion of this Court since *Casey* to directly address the right to abortion states that "the Constitution offers basic protection to the woman's right to choose." *Carhart*, 530 U.S. at 921. *Casey*, in other words, does not establish a toothless standard, but a vigorous one.

First, the undue burden standard clearly continues to permit pre-enforcement challenges to restrictions on abortion. *Casey* itself makes this clear because it holds unconstitutional Pennsylvania's husband notice requirement for abortions, a requirement that had never been enforced. *See* 505 U.S. at 845.

Second, a finding that a statute imposes an undue burden requires a more detailed factual showing than was required under the strict scrutiny standard of *Roe v. Wade*, 410 U.S.

113 (1973). This is so for two reasons: (1) the standard expands the authority of the States to act in furtherance of their "profound interest in potential life," *Casey*, 505 U.S. at 878 (joint opinion), and thus requires district courts to evaluate whether a restriction is designed to, and actually does, further that interest, or the interest in women's health; and (2) even a regulation that does advance one of these interests is invalid "if its purpose or effect is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability." *Id.* Thus, restrictions are invalid under the undue burden standard if a litigant demonstrates as a matter of *fact* that the restrictions either failed to advance one of the two state interests recognized as legitimate in the context of abortion or imposed substantial obstacles upon women seeking abortions.[12] This more fact-based standard necessarily vests in the district courts, as triers of fact, the primary responsibility for assessing whether one of the two recognized state interests is served and whether a restriction will impose a substantial obstacle. *See id.* at 888-91 (relying upon and quoting extensively from district court's "detailed findings of fact regarding the effect of" Pennsylvania's husband notice requirement, which had never been implemented).

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[12] Of course, even before *Casey*, questions of whether restrictions served the state interest in women's health were decided as issues of fact by the federal courts. *See, e.g., Planned Parenthood v. Danforth*, 428 U.S. 52, 76-79 (1976) (Missouri's ban on saline and other methods of abortion did not, as a matter of fact, advance state interest in maternal health because it prohibited safer methods of abortion); *City of Akron v. Akron Ctr. for Reproductive Health*, 462 U.S. 416, 435-37 (1983) (Akron's second-trimester hospitalization requirement did not serve state interest in maternal health because performance of early second-trimester abortions in outpatient clinics was shown to be safe). But prior to *Casey*, courts rarely examined whether the state interest in potential life was furthered as a matter of fact because that interest was only applicable after viability. *See Roe*, 410 U.S. at 164-65.

Third, *Casey* makes clear that if a statute prevents many women from obtaining pre-viability abortions, the statute imposes a "substantial obstacle" and is thus unconstitutional. Thus, this Court wrote that Pennsylvania's husband notice requirement "is . . . *likely* to prevent a *significant number* of women from obtaining an abortion. It does not merely make abortions a little more difficult or expensive to obtain; for *many* women, it will impose a substantial obstacle." *Casey*, 505 U.S. at 893-94 (emphases added). No numerical minimum is set regarding how many women must be prevented before an undue burden will be found. In response to the argument by Pennsylvania that fewer than one percent of women would be affected by the husband notice requirement, this Court responded that "The proper focus of constitutional inquiry is the group for whom the law is a restriction, not the group for whom the law is irrelevant." *Id.* at 894. But this rejoinder to Pennsylvania's argument could not have meant that a law preventing over ten percent of women seeking abortions in an entire state from obtaining an abortion should be upheld; instead, it shows that even a restriction which affects fewer than one percent of all women seeking abortions in a state may be invalid if it prevents many of the affected women from exercising their constitutional right.

Fourth, *Casey*, as well as subsequent statements by Justices of this Court, suggests that a pre-enforcement challenge to an abortion statute like Indiana's may succeed upon a "better record" than this Court had before it in *Casey* itself. Thus, Justice Scalia, criticizing the undue burden standard, observed that "a better record" might require invalidation of restrictions upheld on the record present in *Casey*. 505 U.S. at 992 (Scalia, J., concurring in the judgment in part and dissenting in part, joined by Rehnquist, C.J., and White and Thomas, JJ.). Justice O'Connor, joined by Justice Souter, later opined that the lower federal courts considering a North Dakota law similar to Pennsylvania's

law "should have undertaken the same analysis" that the Casey joint opinion undertook in examining "the record developed in the district court." *Fargo Women's Health Org. v. Schafer*, 507 U.S. 1013 (1993) (O'Connor, J., concurring in denial of stay). And Justice Souter wrote:

> [T]he references to "this record," [in the joint opinion in *Casey*] combined with our readiness to decide the validity of the challenged provisions under the "undue burden" standard, are plausibly understood as reflecting two conclusions: (1) that litigants are free to challenge similar restrictions in other jurisdictions . . . .

Planned Parenthood v. Casey, 510 U.S. 1309, 1313 (Souter, Circuit Justice 1994) (citing Justice O'Connor's concurrence in *Fargo*). It is almost axiomatic that evidence from the implementation of laws like Pennsylvania would be probative of undue burden.

The decision of the court below conflicts with each of these basic features of *Casey*'s undue burden standard. It forecloses pre-enforcement challenges to abortion statutes not specifically invalidated by this Court. It applies a much lower level of scrutiny to the Indiana statute than this Court applied in *Casey* to Pennsylvania's law by indulging in fanciful and speculative inferences as a means of escaping the reasonable consequences of the district court's careful factual findings. It sets a numerical threshold for the number of women that a state may prevent from obtaining abortions much higher than can be supported by any reasonable reading of *Casey*. And in the course of doing this it eliminates consideration by district courts of the best evidence they could possibly have in assessing whether statutes impose undue burdens: evidence from sister states that have implemented similar restrictions.

I. The Opinion of the Court Below Conflicts With This Court's Opinion in *Casey* Because It Holds that Preventing Ten Percent of Women From Obtaining Abortions Does Not Constitute an Undue Burden.

The opinion of Judge Coffey below holds that abortion legislation that imposes a substantial obstacle on "merely 10 to 13 percent" of women seeking abortions is constitutional. A-39. This holding[13] directly conflicts with *Casey* because it would allow States to prevent hundreds of women each year from obtaining abortions in Indiana, while *Casey* makes clear that an undue burden exists if a restriction "is likely to prevent a significant number of women from obtaining an abortion." *Casey*, 505 U.S. at 893. Ten to 13 percent of all women seeking abortions constitutes a "significant number." Certiorari should therefore be granted to resolve this conflict.[14] *See* SUP. CT. R. 10(c).

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[13] The fact that this holding appears in an opinion nominally entitled a concurrence does not diminish its status as a holding of the court below. Indeed, since Judge Coffey joined Judge Easterbrook's opinion only because he understood this holding to be the "thrust of Judge Easterbrook's reasoning," A-39, it may constitute *the* holding of the court below under *Marks v. United States*, 430 U.S. 188 (1977), since the holding that it is constitutionally permissible to prevent 10 to 13 percent of women seeking abortions from obtaining them is arguably narrower than the complete eradication of the undue burden standard achieved in Judge Easterbrook's opinion.

[14] At the very least, the issue of whether 10 to 13 percent of all women seeking abortions in a state constitutes a "significant number" is an important question of federal constitutional law that should be resolved by this Court. SUP. CT. R. 10(c).

II. The Opinion of the Court Below Conflicts with This Court's Opinion in *Casey* Because It Applies An Improperly Deferential Standard of Review.

Casey did not replace the strict scrutiny standard of *Roe v. Wade* with rational basis review. The court below, while acting under the rubric "undue burden," has instead applied the most deferential version of rational basis review in its examination of Indiana's statute and the evidence of its likely effects. Because the lower federal courts are not authorized to substitute their own preferred constitutional tests for those prescribed by this Court, certiorari should be granted.

A. The Seventh Circuit Improperly Dismisses Evidence From States Other Than Indiana, thus Effectively Foreclosing Pre-enforcement Review of Abortion Statutes.

The court below rejects evidence from Mississippi and Utah showing that requiring an "in person" informational visit prevents women from obtaining an abortion:

> Although *Salerno* does not foreclose all pre-enforcement challenges to abortion laws, it is an abuse of discretion for a district judge to issue a pre-enforcement injunction while the effects of the law (and reasons for those effects) are open to debate. What happened in Mississippi and Utah does not imply that the effects in Indiana are *bound to be* unconstitutional, so Indiana (like Pennsylvania and Wisconsin) is entitled to put its law into effect and have that law judged by its own consequences.

A-18 (emphasis in original). This holding conflicts with Casey for two reasons. First, the undue burden standard as enunciated by this Court in *Casey* does not require evidence

of what a law's effects are "bound to be";[15] instead, *Casey* struck Pennsylvania's husband notice requirement based on its "likely" effects. 505 U.S. at 893. *Casey*'s determination of the likely effects of mandatory husband notice was based on findings of the district court about domestic violence, sexual assault and other reasons women might have for avoiding notice to their husbands. These findings allowed the district court, as well as the Third Circuit and this Court, to reach the reasonable inference that compelling notification of an abortion to a husband would, in some cases, amount to a substantial obstacle. This Court did not require a finding that the reasonably inferred effects were *inevitable*, only that they were *likely*; likely violation of women's right to privacy suffices under the undue burden standard.

Second, the court of appeals requires that the effects of a statute in pre-enforcement challenges to abortion laws not be "open to debate." But all predictions of future effects are "open to debate," in the strict sense of that phrase. Will women in Indiana respond to the requirement of an additional visit in the same way they did in Mississippi and Utah? Most probably they will -- but one could *debate* the issue by employing far-fetched arguments, such as those employed by the court below: *perhaps* women in Indiana behave differently from women in Mississippi and Utah, even though there is no evidence in the record that this will occur. *See supra* at 11. Yet the holding of this Court in *Casey* is incompatible with this type of reasoning. Of course the effects of Pennsylvania's husband notice requirement were *open to debate* -- and the Commonwealth of Pennsylvania did indeed debate them. But such debates are settled by factual findings of district courts, including inferences drawn from findings. *Anderson v. City of*

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[15] Although the court below does not explicitly elaborate on the meaning of "bound to be," the tenor of its opinion is that only strictly *inevitable* effects of a statute may be considered by a district court in a pre-enforcement challenge.

Bessemer City, 470 U.S. 564, 574 (1985) ("Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous. This is so even when the district court's findings do not rest on credibility determinations, but are based instead on physical or documentary evidence or inferences from other facts.").

Indeed, what better evidence could a district court have of the likely effects of a statute than evidence demonstrating the effects of similar statutes in other states? If this evidence does not suffice to infer likely effects, then indeed nothing other than the *actual* effects of the statute *in operation* will prove "likely" effects. Moreover, here the district court also had significant *post-enforcement* evidence showing that the information required under Indiana's statute has no persuasive effect, evidence that calls into question the very rationality of the entire statute. *See Casey*, 505 U.S. at 921 (Stevens, J., concurring in part and dissenting in part) ("[A] rigid requirement that all patients wait 24 hours or (what is true in practice) much longer to evaluate the significance of information that is either common knowledge or irrelevant is an irrational and, therefore, 'undue' burden."). Rejecting the best possible pre-enforcement evidence of a statute's likely effects conflicts with *Casey*'s acceptance of evidence from national studies and studies in other states as a proper basis for drawing inferences about the likely effects of Pennsylvania's law. And it leaves virtually no room for pre-enforcement challenges to statutes restricting abortion, because one can develop fanciful explanations of how a restriction *might not* have the effects it probably *will* have.[16]

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[16] Thus, under the Seventh Circuit's approach, this Court would have upheld Pennsylvania's husband notice requirement using reasoning such as the following: Maybe husbands, once notified of their wives' planned abortions, will simply cease their abusive behavior because the statute somehow improves family communication. Even if studies did not bear out *this* hypothesis, maybe husbands *in Pennsylvania* will behave differently than they did in nationwide studies or studies in other states.

Further, since *Casey*, many other courts of appeals have upheld pre-enforcement challenges to statutes restricting abortion, necessarily basing their holdings upon reasonable predictions about the likely effects of the statutes. *See, e.g., Little Rock Family Planning Servs. v. Jegley*, 192 F.3d 794 (8th Cir. 1999) (pre-enforcement challenge to ban on certain methods of abortion); *Planned Parenthood v. Lawall*, 180 F.3d 1022 (9th Cir. 1999) (pre-enforcement challenge to parental involvement statute for abortion); *Causeway Medical Suite v. Ieyoub*, 109 F.3d 1096 (5th Cir. 1997) (pre-enforcement challenge to parental involvement statute for abortion); *Jane L. v. Bangerter*, 102 F.3d 1112 (10th Cir. 1996) (pre-enforcement challenge to ban on certain abortions after 20 weeks gestational age). The decision of the court below conflicts with these decisions as well, and this is an additional reason that certiorari should be granted. SUP. CT. R. 10(a).

B. The Seventh Circuit Improperly Replaces the District Court's Reasonable Inferences from the Evidence With Its Own Unreasonable Inferences, thus Undermining the District Court's Role as Finder of Fact in Undue Burden Cases.

A basic feature of the *Casey* undue burden standard is that district courts will be called upon to assess the purpose and effect of statutes affecting abortion. This role of the district courts, however, will be disrupted and negated if, like the court below, courts of appeals are free to replace or discard inferences made by district courts. Of course, the

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Or maybe women "on the fence" about their decision will be not "prevented," but *influenced*, by possible future abuse to decide in favor of childbirth. Or perhaps women confronted with the statute will be motivated by the requirement to leave their abusive husbands.

In other words, one can develop numerous alternative, though highly unlikely, effects of the Pennsylvania husband notice requirement that diminish its burdens. None of these implausible scenarios outweighs reasonable inferences based on facts found by a district court.

"clearly erroneous" standard that applies to district court findings and reasonable inferences from those findings is designed to guard the fact-finding function of district courts in civil cases in general. As the court below has stated in a different context, where a district court factual finding is "within the range of permissible inferences from [the] evidence, [it is not] clearly erroneous." *Harper v. City of Chicago Heights*, 223 F.3d 593, 600 (7th Cir. 2000), *cert. denied*, 121 S. Ct. 883 (2001). Here, the court below has departed from these basic standards governing review of facts in civil cases. The result is a further dilution of the constitutional protection afforded to women's right to choose abortion by *Casey*.

The burden imposed upon litigants by the court below is severe. Instead of confidently relying upon the clearly erroneous standard, litigants challenging abortion statutes must under the Seventh Circuit's holdings go to much greater lengths to prove their case. It will *not* to supply the district court with sufficient evidence that the restriction in question will prevent women from obtaining abortions or that the restriction advances neither of the interests recognized by this Court as justifying abortion restrictions. Instead, litigants must anticipate possible alternative theories of the facts that an appeals court panel may imagine, and refute those theories.

For example, here the court of appeals speculated that perhaps some different effect occurred in Wisconsin (which also requires an additional in-person visit) than in Mississippi or Utah: "What has happened in Pennsylvania, Wisconsin, and the other states whose informed-consent laws require two visits? .... The record is silent on these matters." A-12.[17]

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[17] In fact, data from Wisconsin was not available at the time trial was held; and, in fact, Exhibit 216 contains an analysis of the effects of Pennsylvania's statute, including an important statement by one abortion clinic director that the percentage of women who changed their minds at some point in the pre-abortion process did not change after the statutory

Should Petitioners have anticipated this remark and met it by further evidence? Is it not equally or more reasonable to suppose that if such evidence existed and supported the constitutionality of Indiana's law, the State would have gathered the evidence and presented it to the district court?

The ultimate effect of the Seventh Circuit's abrogation of the *Anderson* standard in this case is to diminish the undue burden standard even further. In a rational basis review case, a litigant expects the Judiciary to indulge all plausible ways in which a statute may serve a legitimate interest. Indeed, this is the heavy burden borne by a litigant challenging a statute not affecting constitutional rights. But it is not the proper approach to district court factual findings in a case involving constitutional rights. The court below, by indulging implausible factual scenarios and insisting upon evidence that does not exist (or ignoring evidence in the record), imposes so high a burden on litigants challenging abortion statutes that a successful challenge is difficult to imagine. *Casey* does not impose such a burden of proof.

In sum, the decision of the court below (1) raises the number of women that a State may with impunity prevent from obtaining abortions to the hundreds; (2) bars the most valid and probative evidence that exists in pre-enforcement challenges to abortion statutes, namely evidence of the effects of similar laws in other states, with the result that such pre-enforcement challenges become nearly impossible to mount; and (3) raises the burden of proof of plaintiffs challenging abortion statutes to virtually unreachable heights, while simultaneously giving no deference to reasonable factual inferences drawn by district courts. The net effect is to replace the heightened scrutiny of *Casey*'s undue burden

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information was provided, thus corroborating the evidence from Indiana that the information has no persuasive effect. So even where evidence is in the record, or the absence of evidence has a good explanation, the court below requires some ineffable additional proof.

standard with a standard of review at least as deferential as rational-basis review. These conflicts between the abortion jurisprudence of this Court and the decision of the court below should be resolved, and certiorari should be granted.

CONCLUSION

For all the foregoing reasons, the petition for certiorari should be granted.

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